In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 589

A. A. NEWHOUSE and MARY E. MORRIS,
Petitioners,

vs.

CORCORAN IRRIGATION DISTRICT,
Respondent.

PETITION FOR A REHEARING.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Come now the petitioners herein, A. A. Newhouse and Mary E. Morris, and present this, their petition for a rehearing of the petition for a writ of certiorari herein, and in support thereof respectfully show:

I. THE DEBTOR IS NEITHER INSOLVENT NOR UNABLE TO PAY ITS MATURED DEBT AND THE PLAN IS NOT FAIR AND EQUITABLE.

While the respondent Corcoran Irrigation District is a public agency and its property is exempt from execution, the local law of California in effect secures the bonds by the lands of the district. Thus in *Provident Land Co. v. Zumwalt,* 12 Cal. (2d) 365, the Supreme Court of California in a carefully considered opinion said:

> "* * * the lands remain in trust and the district exercises its powers, however broad, as a trustee. Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust."

The court then considering whether payment of the bondholders is one of the objects of the trust, declared:

> "The land is the ultimate and only source of payment of the bonds. It can never be permanently released from the payment of the bonds until they are paid."

The court below disregard our showing that the district is not insolvent in the bankruptcy sense and that it is in fact able to pay its debts as they mature, declaring:

> "The principle of ordinary or private bankruptcy that the assets of the bankrupt, including his property, must be effectively applied to the debts, is sought to be applied to the situation before us. The bankruptcy of a public agency, however, is very different from that of a private person or concern." (14 Fed. (2d) 690.)

However, this same court on the same day in *Fano v. Newport Heights Irrigation District,* 114 Fed. (2d) 563, 565, declared:

> "It is undoubtedly true that the District has not funds in hand to fully pay this due interest and in that sense is insolvent, but it is not only far from insolvent in the bankruptcy sense, but owns debt free, except for the interest mentioned, assets in value many times the indebtedness, * * *"

and refused to confirm the plan of this irrigation district.

There is thus a disagreement amongst the decisions of the Circuit Court of Appeals of the same Circuit.

This public debtor is neither insolvent nor unable to pay its debts as they mature.

a. The bond debt is $733,000 principal, plus $197,-104.78 coupons, plus $44,509.58 penalty interest. (R. 143.)

b. Unpaid matured principal and interest totals $344,614.36. (R. 143.)

The plan of composition offers to pay the creditors $484,500.

The capital assets of the debtor amount to $1,487,-216.53. (R. 143.)

And the bare and raw lands (exclusive of buildings and improvements) are of the present actual value of $4,525,000 as established by the trial judge himself. (R. 34, 35.)

Thus this court, in denying our petition for a writ of certiorari has for guidance of all lower courts ap-

proved a plan which offers less than one-tenth the value of bankrupt's assets.*

On the other side of the ledger the district has on hand cash $135,609.49 and a cash reserve on deposit with the R.F.C. $70,027.14. (R. 143.) It disbursed to the bondholders on the refunding program $62,437.02. (R. 141.)

In addition to this it has purchased out of surplus moneys capital assets consisting of water stock of the total of $94,937.29 (R. 143), a large part of which was purchased since the district went into default.

This is a total liquid asset, mainly cash, of $362,990.94, or practically $20,000 more than the total amount currently due on its alleged indebtedness, counting principal and interest.

Thus this court approves a plan where the debtor is neither insolvent nor unable to pay its debts as they mature. No such yardstick has ever been applied by this court to a private bankrupt. If we concede there was temporary inability to meet maturities on the bonds of the district after principal began to mature, that was no just reason for reducing the district's bonded indebtedness approximately one-half (counting principal and interest) when Section 83 of the bankruptcy act provides for plans which may allow

*This admittedly does not appear from the opinion, but the court will take judicial notice of the fact that there are one hundred irrigation districts in California. They have an association which is closely knit. There are over 20 bankruptcy plans of these irrigation districts now in the courts of California. This case and the *Merced Irrigation District* case are considered as the leading cases for the guidance of lower courts and in fact four appeals now pending in the Ninth Circuit Court of Appeals are by court order to be dismissed if the petitions are denied in this and the *Merced* cases.

extensions of time and when the result so plainly was to deprive security holders of security which the law accorded to them.

If the judgment in the case of *Fano v. Newport Heights Irrigation District* places a correct construction on the words "fair and equitable", this case nullifies the ruling and leaves confusion in the rulings of the same court. We earnestly appeal to the court to rule that a plan is not "fair and equitable" which accords to bondholders but one-tenth of the security behind their bonds. In *Case v. Los Angeles Products Company,* 308 U. S. 106, 84 L. ed. 110, this court ruled that the use of the words "fair and equitable" was to restrain putting into effect a confiscatory plan.

II. THE RECONSTRUCTION FINANCE CORPORATION CANNOT VOTE THE BONDS IT HOLDS.

The Statute, Section 83 (d) 11 U. S. C. 403 (d), provides that the plan shall not be confirmed until it has been accepted in writing by creditors holding "two-thirds of the aggregate amount of claims of all classes affected by such plan * * * but excluding claims owned, held or controlled by the petitioner; * * *"

Now the very plan of composition (R. 9) discloses that $92.09 of every $750 paid the creditors is to be furnished from funds of the district. The district has already disbursed over $62,437.02 in the purchase of the bonds from the original bondholders now held by the Reconstruction Finance Corporation. (R. 141.) Although that corporation holds the bonds, a trust

resulted in favor of the district and these bonds are all "owned" or "controlled" by the district and should not have been counted by the trial judge as votes in favor of the plan of composition. Without this vote the decree fails, because there was no other consenting creditor than the Reconstruction Finance Corporation.

It is respectfully submitted that assuming that the bankruptcy power of Congress does extend to these districts and that such is now the law, nevertheless this court should apply the fundamental principle of private bankruptcy that a plan shall be "fair and equitable" in order to come within the bankruptcy power and it should rule that no exception prevails in favor of an irrigation district or a public debtor. A review of this case should be granted in order to establish that principle as a part of the general law, as well as to iron out the differences between the decisions of the lower court which we have pointed out.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that a writ of certiorari be issued out of and under the seal of this honorable court as prayed for in the petition for writ of certiorari herein.

Dated, Berkeley, California,
January 24, 1941.

Respectfully submitted,
RALPH R. ELTSE,
W. COBURN COOK,
Attorneys for Petitioners.

GEORGE CLARK,
Of Counsel.

CERTIFICATE OF COUNSEL.

We, Ralph R. Eltse and W. Coburn Cook, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Dated, Berkeley, California,
January 24, 1941.

RALPH R. ELTSE,
W. COBURN COOK,
Counsel for Petitioners.

Due service and receipt of a copy of the within is hereby admitted

this_____day of January, 1941.

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Attorneys for Respondent.